

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MICHAEL KUZMA,

Plaintiff,

v.

DECISION AND ORDER

19-CV-597-A

U. S. DEPARTMENT OF JUSTICE,

Defendant.

This Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, case filed by Plaintiff Michael Kuzma, who is seeking the disclosure and release of certain records from Defendant U.S. Department of Justice (“DOJ”) that he asserts were improperly withheld from him, was referred to Magistrate Judge Jeremiah J. McCarthy pursuant to 28 U.S.C. § 636(b)(1) for the performance of pretrial proceedings.

On September 27, 2023, Judge McCarthy filed a Report and Recommendation (“R&R”) (Dkt. No. 46), in which he recommends granting in part and denying in part, without prejudice to renewal, Defendant’s motion for summary judgment (Dkt. No. 36) pursuant to Federal Rule of Civil Procedure 56.¹

¹ After the motion papers were filed but before Judge McCarthy docketed the R&R, he issued an Interim Decision and Order (Dkt. No. 41) requiring an *in camera* review of a random sample of the pages Defendant withheld in full, and deferring issuance of the R&R until that *in camera* production and review had occurred. This decision was prompted by FOIA’s requirement that the Court first make specific findings of segregability regarding the documents to be withheld before approving the application of any FOIA exemption, and “the fact that 90% of the 500 pages were withheld in full[.]” Dkt. No. 46, p. 7.

More specifically, the R&R recommends: (1) denying Defendant summary judgment to the extent the DOJ seeks a determination that it properly segregated Bates nos. 6931-968 and 7116-130, without prejudice to renewal on a more developed showing, but otherwise granting Defendant summary judgment on the issue of segregability of the documents withheld in full; (2) denying Defendant summary judgment on the applicability of Exemption 3, without prejudice to renewal upon a supplemental record; (3) granting Defendant summary judgment on the applicability of Exemptions 6, 7(C), and 7(D); and (4) denying as moot Defendant's summary judgment motion with respect to the applicability of Exemption 7(E). The R&R finds (see Dkt. No. 46, § E) that Plaintiff's arguments concerning additionally withheld documents are not at issue in the instant motion. As to attorney's fees and costs, the R&R notes that while Defendant does not contest Plaintiff is entitled to attorney's fees but instead argues his request should be denied without prejudice to renewal after the instant motion is decided, the issue is nevertheless premature because Plaintiff has not yet sought an attorney's fees award.

Federal Rule of Civil Procedure 72(b)(3) provides, "[t]he district judge must determine de novo any part of the magistrate judge's disposition *that has been properly objected to*" (emphasis added). Here, no objections to the R&R have been filed. "When no timely objection is filed, the [C]ourt need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." 1983 Advisory Committee Note to Fed. R. Civ. P. 72(b); see *Patton v. Ford Motor Co.*, 14-CV-0308-RJA-HBS, 2017 WL 2177621, 2017 U.S.

Dist. LEXIS 76148, *5 (W.D.N.Y. May 18, 2017).

The Court finds no clear error with respect to Magistrate Judge McCarthy's recommendations. As such, it is hereby

ORDERED, that pursuant to 28 U.S.C. § 636(b)(1) and for the reasons set forth in the R&R, Defendant's motion (Dkt. No. 36) for summary judgment is GRANTED, except the motion is DENIED without prejudice to renewal as to the segregability of Bates nos. 6931-968 and 7116-130, and Defendant's reliance on Exemption 3, and DENIED AS MOOT with respect to Defendant's reliance on Exemption 7(E); and it is further

ORDERED that this case is recommitted to Magistrate Judge McCarthy for further proceedings, *i.e.*, any renewed motion by Defendant as to the segregability of Bates nos. 6931-968 and 7116-130 and/or Defendant's reliance on Exemption 3, and any motion filed by Plaintiff for attorney's fees and costs.

IT IS SO ORDERED.

s/Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT COURT

Dated: December 6, 2023
Buffalo, New York